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Indigenous refugees and cultural erosion: possibilities and limits of international refugee and indigenous peoples law in the protection of indigenous cultural expressions related to traditional land and native language*

Refugiados indígenas e erosão cultural: possibilidades e limites do direito internacional dos povos indígenas e dos refugiados na proteção de expressões culturais indígenas relacionadas à terra tradicional e à língua nativa

Rickson Rios Figueira**

Abstract

This article investigates whether the legal frameworks of international refugee and indigenous peoples law can protect indigenous groups in a refugee situation. It questions if these regimes' main instruments are able to offer effective protection to indigenous refugees in a way that safeguards their cultural specificities, particularly those related to their language as a cultural expression and a way of organizing reality, and the ones derived from the bond with their traditional lands. As a method, the article first introduces the concepts and problems that arise when thinking indigenous culture in relation to the two dimensions of analysis, land and language, and then scrutinizes the legal solutions available in the referred frameworks, evaluating the conditions of their applicability to the situation of indigenous refugees. For this examination, it first deduces a concept of indigenous refugee from international legal studies and instruments. The following section explains the mandatory density of the applicable rules, especially those found in soft law instruments. It proceeds to analyse the impact of the indigenous refugee condition to their cultural expressions to identify the norms that provide its protection. This phenomenon is studied in two scenarios: the indigenous refugee's insertion, under precarious conditions, to urban contexts as a consequence of their uprooting from traditional lands; and the linguistic cultural erosion in the host State. The article concludes that, despite the existence of norms that offer some protection, they prove insufficient for the preservation of indigenous refugees' cultural expressions in face of the profound vulnerability of their condition.

Keywords: Indigenous peoples. Refugees. Cultural protection. Indigenous lands. Indigenous languages.

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Resumo

Esse artigo investiga se os quadros jurídicos do direito internacional dos refugiados e do direito internacional dos povos indígenas alcançam proteger grupos indígenas em situação de refúgio. Ele questiona se os principais instrumentos desses regimes são capazes de oferecer efetiva proteção aos indígenas refugiados de modo a salvaguardar suas especificidades culturais, particularmente aquelas relacionadas à sua língua, como expressão cultural e modo de organizar a realidade, e as derivadas dos laços com suas terras tradicionais. Como método, o artigo primeiramente introduz os conceitos e problemas levantados ao pensar-se a cultura indígena em relação às duas dimensões de análise, terra e língua, para então escrutinar as soluções legais disponíveis nos referidos quadros, avaliando as condições de sua aplicabilidade às situações de indígenas refugiados. Para esse exame, primeiro deduz-se um conceito de indígena refugiado a partir de estudos jurídicos e das definições de instrumentos internacionais. Na seção seguinte, explica-se a densidade obrigacional das regras aplicáveis, especialmente aquelas encontradas em instrumentos de soft law. Procede-se à análise do impacto da condição do indígena refugiado sobre suas expressões culturais para identificar as normas que oferecem proteção. Esse fenômeno é estudado em dois cenários: a inserção de indígenas refugiados, em condições precárias, em contextos urbanos como consequência do desarraigo de suas terras tradicionais; e a erosão cultural linguística no Estado de acolhida. O artigo conclui que, apesar da existência de normas que oferecem alguma proteção, elas se provam insuficientes na preservação de expressões culturais de refugiados indígenas em face de sua condição de profunda vulnerabilidade.

Palavras-chave: Povos indígenas. Refugiados. Proteção cultural. Terras indígenas. Línguas indígenas.

1 Introduction

Although little studied, the history of indigenous peoples in a situation of refuge is not new. There are records from the last quarter of the 19th century that reveal that indigenous groups, such as the Crees, from the Lake Superior region in Canada, and the Yaquis, which are originally from what is now the state of Sono-

ra, Mexico, crossed the borders in search of protection in the United States, fleeing executions, extermination campaigns and forced labour.¹ In the past 50 years, there have been several reports of displacement of threatened indigenous groups seeking protection in other countries: in the 1980s, Indians of the Maya people left Guatemala during the civil war in search of refuge in Mexico; also in the 1980s, the Montagnards were taken from Vietnam to the United States; so did the Hmong of Laos for their support for the USA during the Vietnam War; in Africa, members of the Twa/Batwa community moved from Burundi to Rwanda between 2006 and 2007; the Somali Bantus, fleeing the conflict in the Horn of Africa, obtained temporary refuge in Kenya.² More recently, the world has witnessed the persecution undertaken by the government of Myanmar against the Rohingya people, a group originated from the state of Rakhine, located West of the country, that claims to be indigenous.³ Also in South America, in the last years, indigenous groups from Venezuela have been requesting refugee status in Brazil – which is the case of the Warao and E'ñepá⁴ – and in Colombia – the case of the Yukpas.⁵

The intersection between conditions recognized as deeply vulnerable – indigenous and refugee –, imposes a series of difficulties for the effectiveness of international refugee and indigenous peoples law.⁶ The

¹ RENSINK, Brenden W. *Native but foreign: indigenous immigrants and refugees in the North American Borderlands*. College Station: Texas A&M University Press, 2018. p. 51.

² YESCAS, Carlos. *Hidden in plain sight: indigenous migrants, their movements, and their challenges*. Migration Policy Institute, 2010. Available at: <https://www.migrationpolicy.org/article/hidden-plain-sight-indigenous-migrants-their-movements-and-their-challenges> Access in: 23 jul. 2020.

³ WARE, Anthony; LAOUTIDES, Costas. *Myanmar 'Rohingya' Conflict*. Oxford: Oxford University Press, 2018. p. 78-79.

⁴ FIGUEIRA, Rickson R. Direito dos povos indígenas e migrações forçadas: direito à consulta e ao consentimento livre, prévio e informado de indígenas da Venezuela no Brasil. In: PALUMA, Thiago; SQUEFF, Tatiana C. (org.). *Migrações Internacionais no Século XXI: perspectivas e desafios*. Belo Horizonte: Arraes, 2019. p. 144-164. p. 145.

⁵ AL JAZEERA. *Indigenous Yukpa face humanitarian crisis after fleeing Venezuela*. 2018. Available at: <https://www.aljazeera.com/news/2018/03/indigenous-yukpa-face-humanitarian-crisis-fleeing-venezuela-180310123952276.html> Access in: 23 jul. 2020.

⁶ Intersectionality theory contributes to the identification of at first sight invisible vulnerabilities, among other reasons, due to their erasure from classic formulations of international law. It is a fundamental analytical resource to avoid essentialism, that is, to refrain from isolating and universalizing experiences of certain privileged groups of identity segments, suggesting unity, which renders the

phenomenon of indigenous refuge imposes a series of issues that challenge the solutions available in these legal frameworks and raise questions such as: may a group of indigenous refugees (or even asylum seekers) enjoy the right to their cultural specificities, traditions and customs in the welcoming country as recognized by the legal instruments regarding the rights of indigenous peoples? Will an indigenous refugee have the right to self-determination under the terms of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), be consulted and actively participate in all stages – from drafting to implementation – of programs and projects that affect their lives as provided for in ILO Convention 169?

Even if the norms for the protection of refugees and those of the rights of indigenous peoples were largely compatible – an analysis that deserves its own study and, therefore, will not be the first object of this article –, the circumstances inherent to the condition of an individual who is at the same time indigenous and a refugee subject him to a state of precariousness which results, among other things, in a process of cultural erosion. If having traces of any human group's culture diluted is undesirable, for indigenous peoples, which are already characterized by numerically reduced and deeply impoverished populations⁷ – a consequence of the devastating effects of violent and voracious, modern and contemporary colonization processes –, this erosion can represent the total destruction of their culture, the extinction of their language as a means of organizing reality, an epistemicide⁸ that could take place only in a

few generations.

Thus, the problem proposed by this article is to verify whether refugee law can protect indigenous groups in a refugee situation, guaranteeing their cultural specificities, and if, at the same time, the law of indigenous peoples is able to safeguard the traditional customs of the indigenous refugee or asylum seeker. Otherwise, it should be asked whether the normative solutions available in both legal frameworks are sufficient to safeguard the cultural identities of indigenous refugee groups from a process of cultural loss.

There are many studies dedicated to investigating the actual access by refugees to the rights provided in the international regimes that concern them. Likewise, there are several works that deal with the implementation of the rules of international law of indigenous peoples through the subjective enjoyment of their rights, especially considering their cultural specificities. However, scarcer is the literature that, when considering the intersection of identities inherent to the subject who is at the same time indigenous and refugee, as well as the especially precarious circumstances of this individual's condition, has as its main object the concurrence of the norms of refugee and indigenous peoples law. This article seeks to situate itself in this field of investigation, delimiting, however, its object to the impact that the synchronic condition of the indigenous refugee has on their access to specific rights, especially those that safeguard their cultural expression in terms of land and native language.

In this sense, as a working method, the analytical sections of the article seek to initially present the concepts and problems related to indigenous culture while associated with each of these dimensions of analysis, land and language, as reported in the legal, sociological and anthropological literatures, to then examine the legal solutions available in the international refugee and indigenous peoples law, assessing the conditions of their applicability to the concrete situation of indigenous refugees. Although it is recognized that a broad legal dimension of human rights may also refer to the object of this article, the analysis will focus on the provisions

particularities arising from the competition for two or more social markers, whether gender, sexual orientation, physical ability, race, age, nationality or class, invisible. FIGUEIRA, Rickson Rios; PRA-TA FILHO, Ricardo. Interseccionalidade e a condição da refugiada LGBTI+. In: JUBILUT, Liliana et al. (org.). *Direitos humanos e vulnerabilidades e o direito internacional dos refugiados*. Santos: Universitária Leopoldiana, forthcoming, [s.d.]. See also: HARRIS, Angela. Race and Essentialism in Feminist Legal Theory. *Stanford Law Review*, v. 42, p. 581-616, 1990; DAVIS, Aisha Nicole. Intersectionality and international law: recognizing complex identities on the global stage. *Harvard Human Rights Journal*, v. 28, p. 205-242, 2015.

⁷ According to a 2017 report by the then Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpus, "[...] while indigenous peoples account for 5 per cent of the world's population, they comprise 15 per cent of those living in poverty. Some 33 per cent of people living in extreme rural poverty globally come from indigenous communities." UNITED NATIONS. *Report of the Special Rapporteur on the rights of indigenous peoples*, Human Rights Council (Thirty-sixth session), A/HRC/36/46, 2017. p. 3.

⁸ *Epistemicide* is a mechanism for the suppression of non-Western knowledge, represented, in its most violent version, by European

colonialism, but which remains today in forms that are not always subtle. SANTOS, Boaventura de Souza. *Para Descolonizar el Occidente: más allá del pensamiento abismal*. Buenos Aires: Consejo Latinoamericano de Ciencias Sociales – CLACSO; Prometeo Libros, 2010. p. 68.

of international refugee and indigenous peoples' law to investigate how they respond to the concrete condition of the indigenous refugee.

It is argued that, even if there were a legal environment in the host country widely open to the formal application of the rules of international indigenous peoples law, guaranteeing and promoting their cultural specificities, the degree of vulnerability of indigenous refugees is such that, more often than not, subjects who find themselves in this condition, in their plight for a solution to the immediate problems that threaten their very existence, adapt to circumstances that lead them to a process of cultural erosion.⁹ Even when refugee status is granted, the international standards on the subject do not provide the necessary specific protection that guarantees the preservation of the cultural identities of indigenous people.

To this end, the article initially proposes a concept of indigenous refugee based on international references in which conceptual images of indigenous and refugee are constructed separately. The first section additionally maps the main international regimes whose norms will be the object of the analysis of this article and investigates its mandatory scope and justification for applicability. The following section analyses the relationship between the indigenous and their traditional land as a fundamental factor in sustaining a significant part of their cultural expression, as well as the impact that the removal from their traditional land has for the indigenous refugees. Finally, the analysis focuses on the threats that the linguistic heritage suffers in situations of profound vulnerability that indigenous people undergo in a condition of refuge, as well as the legal responses available in international law.

⁹ The International Organization for Migration (IOM) conceptualizes *vulnerability*, in the migratory context, as the "reduced capacity to resist, face or overcome violence, exploitation, abuse and/or violations of their rights, mainly of the following kind: Illegal deprivation of liberty and arbitrary arrest; Violations of workers' rights and obstacles to the enjoyment of fair and favourable work conditions; Denial of the right to family life and family unit; Torture; Cruel, inhuman or degrading treatment; Pushbacks (*refoulement*); Illegal limitations of the right to come and go; Limitations of the right to a nationality (statelessness); Slavery; Serfdom; Limitation or denial of the rights to education and health care; Sexual exploitation and abuse; Exploitation and abuse against workers." YAMADA, Erika; TORELLY, Marcelo (org.). *Legal aspects of assisting the Venezuelan migrants in Brazil*. Brasília: International Organization for Migration (IOM), 2019. p. 27.

2 Conceptual and theoretical aspects

The conditions of the indigenous and refugee subject can be analysed from different fields of the social and human sciences, such as sociology, anthropology and law. The conceptual image of the indigenous refugee cannot, however, be adequately translated by the mere juxtaposition of the definitions of *indigenous* and *refugee*. This specific intersectional condition in which the two identities are found affects in many dimensions the subject's life and circumstances, rendering difficult the operation of subsuming its real nature to the conceptual images available in international refugee and indigenous peoples law.

Just as there is no conceptual image in international law that adequately reflects the reality of the indigenous refugee, neither there is a legal framework that guarantees rights according to their specific demands. And, although it can be argued – and in certain circumstances recognized – that this double identity condition enables the competition and more favourable application of the rules of different legal frameworks, there are a myriad of situations in which this operation is not so obvious, for reasons that range from the lack of norms to regulate particular circumstances of indigenous refugees, to interpretations of the norm that hinder or exclude the recognition of institutional competences and even the application of a law that aims to protect the individual when subjected to one of these conditions.

Furthermore, inserted in contexts different than those from which they originate, indigenous people, when in a refuge situation, are also vulnerable to subjective transformations and to a resistance from institutions and agents operating the law when it comes to guaranteeing specific rights to individuals whose reality does not correspond perfectly to the conceptual image described in the norm. Thus, symbolic elements commonly associated with the indigenous – such as the bond with their traditional land – can be re-signified by the subject who becomes a refugee. This situation might result in a difficulty, for the enforcer of the law, in discerning the ontological integrity of the indigenous person, which may even lead to a refusal of recognizing rights to which this individual is entitled. In addition, the profound precariousness that generally characterizes indigenous refugee groups pushes them into conditions of dependency and subservience, in a logic of internal colonia-

lism¹⁰, and may subject them to a process of fraying their culture and fracturing what is recognized as their indigenous identities, all conveniences to make it difficult for them to have access to their rights.

However, if there is a challenge to understand the web of concepts, rights and meanings that play in the relationship established between the indigenous refugee and the competent institutions and authorities of the host State, there is another aspect that requires equal attention: the migratory movement in itself. In order to carry out an analysis on indigenous refugees, it will be necessary, as Bringas states, to map the types of migratory processes in which they may be inserted. These are: (1) ancestral indigenous mobility, which refers to the movement that takes place within the space of the indigenous land of traditional occupation; (2) transnational indigenous migration, which concerns the movement that takes place beyond political and geographical borders, seeking to maintain contacts and exchanges between the community of origin and destination; and (3) the migration from the rural to the urban world, characterized by a process of adaptation of the indigenous, which tends to disconnect them from central values related to their collective rights, such as land, their people's cosmovision, customs, traditions etc.¹¹

The scope of this article focuses mostly on the kind of indigenous migration motivated by the coercive fac-

tors of expulsion, recognized in the hypotheses established in international refugee law. Complementarily, the third type of movement, from the rural to the urban world, is also of interest to this analysis, since it imposes the same challenges faced by indigenous refugees, who in general have as their destination urban spaces in the host States.

The term migration is often associated with a movement resulting from the free choice of an individual – usually exercised on the basis of economic rationality –, who is presented with at least two options: staying or migrating. However, indigenous emigration, especially of those who were living in their traditional lands and according to immemorial customs, is not decided based on this logic. In this sense, Bringas states that:

There is a kind of coercion (for political, economic, ideological and environmental reasons, etc.), both in economic migrations and in forced indigenous displacement, which compels these individuals, communities and peoples to migrate.¹²

Finally, from the conceptual point of view, for the purposes of this article, I consider an indigenous refugee to be a subject belonging to an indigenous people, who migrates to another country in search of protection for the reasons provided in refugee law. For the proposed analysis, it is of less importance whether or not the status of refugee will be recognized by the competent authorities of the host State. It is more relevant the condition of profound vulnerability in which the indigenous person in a situation of refuge is found.

The lack of specific regimes for indigenous refugees makes it inescapable for the conceptual analysis to be based on the existing definitions in international instruments on the subject. Thus, indigenous and refugee are concepts already developed in international reports and studies or already have a more or less precise legal delimitation.

The first comprehensive report published by the United Nations (UN) on the definition of indigenous people was the Study of the Problem of Discrimination Against Indigenous Populations. In this document, the author, Martínez Cobo, demonstrates the complexity and variety of conceptual dimensions and contexts from which the definition of indigenous peoples can be

¹⁰ The concept of internal colonialism is associated with the subjugation of native peoples to conditions similar to those that characterize an international colonial or neocolonial domain. According to Casanova, under internal colonialism, these peoples "[...] are in a situation of inequality vis-à-vis the elites of the dominant ethnic groups and the classes that comprise them; its administration and legal-political responsibility concern the dominant ethnic groups, the bourgeoisies and oligarchies of the central government or its allies and subordinates; its inhabitants do not participate in the highest political and military positions of the central government, except as "assimilated"; the rights of its inhabitants and their economic, political, social and cultural situation are regulated and imposed by the central government; in general, the colonized within a nation-state belong to a different "race" from the one that dominates the national government, which is considered 'inferior' or, at most, is converted into a "liberating" symbol that it is part of the state demagog; most of the colonized belong to a different culture and speak a language other than the 'national.'" CASANOVA, Pablo G. *Colonialismo interno: una redefinición*. In: BORÓN, Atilio *et al.* (org.). *Teoría marxista hoy: problemas y perspectivas*. Buenos Aires: CLACSO, 2006. p. 409-434.

¹¹ BRINGAS, Asier Martínez de. The impact of migration processes on indigenous peoples' rights. In: CORRADI, Giselle *et al.* *Critical Indigenous Rights Studies*. London/New York: Routledge, 2019. p. 65-83.

¹² BRINGAS, Asier Martínez de. The impact of migration processes on indigenous peoples' rights. In: CORRADI, Giselle *et al.* *Critical Indigenous Rights Studies*. London/New York: Routledge, 2019. p. 65-83. p. 71.

constructed. In this sense, any definition of indigenous people must take into account aspects such as their culture, ancestry and language, as well as the criteria established by indigenous peoples themselves.¹³ According to the United Nations Development Group, in a guide that produced in 2009 on issues concerning indigenous peoples, the international community has not formally adopted a concept of indigenous peoples, nor such step is necessary for the recognition and protection of their rights.¹⁴ Nevertheless, the definition of indigenous peoples proposed by the Cobo Report is still widely accepted in several international forums. According to him,

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹⁵

Thus, again, drawing from the concept proposed by the Cobo Report, will be considered an indigenous refugee those who, originally belonging to the communities, peoples or nations to which the definition refers, compose part of a minority distinct from other sectors of the majority society of their country of origin, with territories, ethnic identity, social institutions, legal systems and their own cultural standards, and whose circumstances subsume to the concept of refugee provided

for in international law. Therefore, they are indigenous people whose situation is described in the provisions of Article 1 of the Geneva Convention on the Status of Refugees, 1951, in conjunction with the 1967 New York Protocol, which removed the temporal and geographical limitations of the original concept of refugee, and also with the Cartagena Declaration of 1984, which extended the concept of refugee to also include those who flee

their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.¹⁶

3 The legal scope of the rules applicable to refugees and indigenous people

Another aspect that needs further discussion is the mandatory nature of international standards that can be applied to indigenous refugees. They can be recognized in sources located in the already referred fields of international law – indigenous peoples and refugee law – and are composed of hard and soft law instruments.¹⁷

In the case of international refugee law, the rules that draw the conceptual image of the refugee are found mainly in the 1951 Geneva Convention Relating to the Status of Refugees, in the 1967 New York Protocol, which complements it – and which also has conventional nature –, and the 1984 Cartagena Declaration, which, inspired by the Organization of the African Union's Refugee Convention, as seen above, broadens

¹³ UNITED NATIONS. *Study of the Problem of Discrimination Against Indigenous Populations: Final report submitted by the Special Rapporteur, Mr. José Martínez Cobo*. Conclusions, Proposals and Recommendations. ECOSOC, 1981. Available at: <https://www.un.org/development/desa/indigenouspeoples/publications/martinez-cobo-study.html> Access in: 23 jul. 2020.

¹⁴ UNITED NATIONS. *Guidelines on Indigenous Peoples' Issues*. UNDG, 2009. Available at: https://unsdg.un.org/sites/default/files/UNDG_guidelines_EN.pdf Access in: 23 jul. 2020.

¹⁵ UNITED NATIONS. *Study of the Problem of Discrimination Against Indigenous Populations: Final report submitted by the Special Rapporteur, Mr. José Martínez Cobo*. Conclusions, Proposals and Recommendations. ECOSOC, 1981. Available at: <https://www.un.org/development/desa/indigenouspeoples/publications/martinez-cobo-study.html> Access in: 23 jul. 2020. Elements contained in the concept proposed by the Cobo report can be found in other definitions of indigenous and traditional populations. See: LEUZINGER, Márcia Dieguez; LYNGARD, Kylie. The land rights of indigenous and traditional peoples in Brazil and Australia. *Revista de Direito Internacional*, Brasília, v. 13, n. 1, p. 419-439, 2016.

¹⁶ Extract from the Third Conclusion of the Declaration adopted at the Colloquium on International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems," held in Cartagena, Colombia, between 19 and 22 November 1984. *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*. 22 November 1984. The present investigation is geographically limited to the inter-american context, once it takes the 1984 Cartagena Declaration as reference to establish the reach of the refugee definition. CARTAGENA. *Declaração de Cartagena de 1984*. Available at: https://www.acnur.org/fileadmin/Documentos/portugues/BD_Legal/Instrumentos_Internacionais/Declaracao_de_Cartagena.pdf?view=1 Access in: 23 jul. 2020.

¹⁷ As already explained in the Introduction, human rights norms and the rules of specific regimes on cultural heritage are also of interest in the analysis carried out in the present work, but in a complementary way.

the scope of the conceptual image of the refugee. The Cartagena Declaration, an instrument of soft law, has generally had its provisions incorporated into the domestic legislation of Latin American states,¹⁸ as Brazil did through Law 9.474/1997.¹⁹

Regarding international indigenous peoples law, the analysis of the mandatory scope of international soft law norms gains greater relevance because, unlike what happened with the Cartagena Declaration, the UNDRIP and the American Declaration on the Rights of Indigenous Peoples (ADRIP) were not accompanied by an intense movement of incorporation into their national legislation from signatory States.²⁰ This, however, should not automatically be seen as a sign of normative weakness of these Declarations. There are other factors that can guarantee – and they do guarantee, in the case of the aforementioned Declarations – a certain degree of expectation from the international community regarding the observance of its provisions. In addition, there are reasons that justify advancing the process of realizing the rights of indigenous peoples through soft law.

According to Barelli, there are fundamentally three reasons for, in cases such as the rights of indigenous peoples, preferring the adoption of a strategy for expanding rights through the formation of international

soft law instruments, considered to be of lower obligatory density if compared to international treaties.²¹ The first is the possibility that there will be few ratifications and accessions to an international treaty. 1989 ILO Convention 169, for example, has been ratified to date only by 23 states, severely limiting its global reach.²² The second is related to soft law instruments' negotiation processes, in which there is greater space for the participation of non-state actors. In the case of international treaties, there are stages in which these actors are excluded. In fact, the advances in international indigenous peoples law are proportional to the centrality in international bodies which these indigenous movements have been conquering in the last thirty years, as observed by Burger, through assertive negotiations on the issues that concern them.²³ Finally, the third reason concerns the immediate response that the international community gives to an instrument of soft law. An international treaty to enter into force depends on a certain number of ratifications, potentially delaying the immediately necessary rights of indigenous peoples for years.

Another aspect that must be evaluated with regard to declarations is its mandatory scope. In a 2010 report on the rights of indigenous peoples, the International Law Association affirmed that, despite having been instrumentalized through a recommendation constituted under the terms of articles 10, 11 and 13(1) of the UN Charter, UNDRIP would become an instrument of greater authority,²⁴ both for the provisions of the first paragraph of the preamble to the Declaration itself²⁵

¹⁸ In Colombia, Decree No. 2.840/2013; in Argentina, Law No. 26.165/2006; in Chile, Law No. 20.430/2010; in Mexico, the Law on Refugees, Complementary Protection and Political Asylum, 2011. In all cases, the conceptual extension of refugee proposed in the third conclusion of the Cartagena Declaration was incorporated.

¹⁹ Law 9.474/1997 defines the mechanisms for implementing the 1951 Geneva Convention on the Status of Refugees, but incorporates, in its article 1, the expanded concept of the 1984 Cartagena Declaration. BRASIL. *Lei n. 9.474, de 22 de julho de 1997*. Define mecanismos para a implementação do Estatuto dos Refugiados de 1951, e determina outras providências. Available at: http://www.planalto.gov.br/ccivil_03/leis/19474.htm Access in: 23 jul. 2020.

²⁰ At first, states with large indigenous populations, such as the United States, Canada, Australia and New Zealand, did not even sign the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Canada, for example, refused to adopt UNDRIP when proclaimed by the UN General Assembly in 2007, mainly because it understands the requirement contained in the Declaration to demand free, prior and informed consent from interested indigenous peoples in the face of the possibility of if they implement development projects on their land. In 2010, Canada finally adopted the Declaration, emphasizing that it is an instrument that expresses aspirations rather than legally binding commitments. United States, Australia and New Zealand also changed their position, subsequently signing the Declaration. FLANAGAN, Tom. *Squaring the circle*. adopting UNDRIP in Canada. 2020. Available at: <https://www.fraserinstitute.org/studies/squaring-the-circle-adopting-undrip-in-canada> Access in: 23 jul. 2020.

²¹ BARELLI, Mauro. The role of soft law in the international legal system: the case of the United Nations Declaration on the Rights of Indigenous Peoples. *International & Comparative Law Quarterly*, London, v. 58, n. 4, p. 957-983, out. 2009.

²² INTERNATIONAL LABOUR ORGANIZATION. *Ratifications of C169 – Indigenous and Tribal Peoples Convention*. Available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 Access in: 23 jul. 2020.

²³ BURGER, Julian. From outsiders to centre stage: Three decades of indigenous peoples' presence at the United Nations. In: LENNOX, Corinne; SHORT, Damien (eds.). *Handbook of Indigenous Peoples' Rights*. London/New York: Routledge, 2016. p. 315-330.

²⁴ INTERNATIONAL LAW ASSOCIATION. *The Hague Conference: Rights of Indigenous Peoples*, 2010. Available at <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1244&StorageFileGuid=07e8e371-4ea0-445e-bca0-9af38fcc7d6e> Access in: 23 jul. 2020.

²⁵ "The General Assembly, [g]uided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter. UNITED NATIONS (UN). *United Nations Declaration on the Rights of Indigenous Peoples*, 2007.

and for the support it has gained within the UN and other international organisations.²⁶

The greater legal density of declarations such as the American and the UN, according to Barelli, is also related to three factors.²⁷ The first concerns the correspondence between the provisions of a declaration with rights already recognized, particularly in the regimes of human rights and rights of indigenous peoples. This is the case, for example, of the specific cultural expression indigenous peoples are entitled to, according to the aforementioned Declarations, corresponding to the provisions of Article 27 of the International Covenant on Civil and Political Rights. The second factor refers to the declarations as the first step towards the creation of a multilateral treaty, as was the case with the Universal Declaration of Human Rights, which gave rise to the drafting of the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, in addition to a series of specific conventions. The third factor concerns the possibility of declarations creating customary law from its wide acceptance – configuring an *opinio juris*²⁸ – and incorporation into the practice of States, at the domestic and international levels.²⁹

²⁶ In 2008, the then United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, declared that he would assess the conduct of States based on the provisions of the United Nations Declaration on the Rights of Indigenous Peoples. In addition to the UN, the ILO and UNESCO have also taken it as a parameter in their policies and programs. INTERNATIONAL LAW ASSOCIATION. *The Hague Conference: Rights of Indigenous Peoples*, 2010. Available at <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1244&StorageFileGuid=07e8e371-4ea0-445e-bca0-9af38fcc7d6e> Access in: 23 jul. 2020.

²⁷ BARELLI, Mauro. The role of soft law in the international legal system: the case of the United Nations Declaration on the Rights of Indigenous Peoples. *International & Comparative Law Quarterly*, London, v. 58, n. 4, p. 957-983, out. 2009. p. 966-967.

²⁸ In its opinion regarding the Legality of the Threat or Use of Nuclear Weapons, in 1996, the International Court of Justice declared that: “[t]he Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule”. INTERNATIONAL COURT OF JUSTICE. *Legality of the Threat or Use of Nuclear Weapons*. Advisory Opinion, 1996. Available at: <https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> Access in: 23 jul. 2020.

²⁹ In an article published on the website Jurist, James Anaya and Siegfried Wiessner, responding to States which in their votes rejected

4 The uprooting from the land and its impact on the cultural expression of indigenous refugees

The land for indigenous people is not just a territory. It does not play in the life of the indigenous the same role that could be assumed in the institutes of possession and property. The relationship between indigenous people and land is biunivocal. The indigenous land belongs to its people, but they also belong to their land. Thus, when uprooted from their original land, the indigenous person does not just lose their place: they become orphans, leaving behind a piece of themselves. In the indigenous mode of living, land and culture are inextricably mixed. The violence of uprooting them from their land affects the material and immaterial cultural heritage of a people and adds to the other violences that force the indigenous to seek refuge in another country.

In the place of destination, even when the settlement policies are functional – which is not usually the case in developing countries, the destination of most refugees in the world³⁰ –, the solutions offered by the host State rarely take into account the specificities of indigenous refugees, which may imply a process of cul-

any possibility of the Declaration becoming customary international law, sought to demonstrate that then there were already practices adopted internally by those same States, both concerning the right that indigenous peoples have to maintain and develop their cultural identity, spirituality, language and modes of living, as well as regarding the right to self-determination of indigenous peoples, with this being the most disputed. According to Anaya and Wiessner, UNDRIP's sense of constant self-determination is more associated with a cultural and spiritual affirmation of indigenous peoples than with the Western sense of political independence. Considering this conceptual scope, they seek to demonstrate that the states that opposed UNDRIP were already adopting practices that respect the determination and self-government of indigenous peoples that are in their territory. Finally, they maintain that there is also an *opinio juris* for the very participation of these States in a process whose objective is to create legal norms and not only an instrument of aspirations. ANAYA, James; WIESSNER, Siegfried. *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment. Jurist*, oct. 2007. Available at: <http://www.jurist.org/forum/2007/10/un-declaration-on-rights-of-indigenous.php> Access in: 23 jul. 2020; ANAYA, James. *International Human Rights and Indigenous Peoples*. New York: Aspen Publishers, 2009.

³⁰ According to UNHCR, by the end of 2019 there were about 79.5 million people forcibly displaced (among which, around 26 million were recognized as refugees), 85% of whom were sheltered in developing countries. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES. *Figures at a Glance*. Available at: <https://www.unhcr.org/figures-at-a-glance.html> Access in: 23 jul. 2020.

tural erosion, that varies in degrees of depth and speed.

However, of all the factors that indigenous refugees are deprived of, land is possibly the one that most affects them. The consubstantial relationship between the indigenous and the land defines them ontologically. It is this relationship that, according to Wiessner, distinguishes indigenous peoples from other minorities. According to him,

This differentia specifica of indigenous peoples, the collective spiritual relationship to their land, is what separates them also from other groups generally, and diffusely, denominated 'minorities', and what has created the need for a special legal regime transcending the general human rights rules on the universal and regional planes.³¹

In this sense, the relationship between indigenous peoples and their original lands transcends the process of collecting and producing food.³² The practices associated with food production represent only a thin layer of the land's significance to indigenous peoples. This preponderance is mostly attributed when viewed from the dominant rationality diffused through the majority of society, with roots embedded in economic logic. Indigenous literature has repeatedly affirmed a unique cosmovision that includes the particular relationship between the people and the land from which it originates. The indigenous leadership Davi Kopenawa told the anthropologist Bruce Albert the meaning of the land for the Yanomami people.

Deep soil is red and bad. Plants cannot grow stronger there. The forest's value of growth lives in the part of the soil at the surface. A damp breath of life comes out of it, which we call *wahari a*. This cold exhalation comes from the darkness of the underworld, from its great river *Motu uri u* and from *Xiwãripo*, the chaos being. It belongs to the spirit of the forest, *Urihinari*. Its coolness mostly spreads during the night, for during the day it returns into the soil as soon as the sun becomes hot. [...] This cool moisture from the ground is a **liquid** like sperm. It fertilizes trees by penetrating into their roots

and seeds. This is what makes them grow and flower. If it dries up, the earth loses its smell of growth and gets barren. It no longer yields any food. But when this liquid impregnates the soil, it becomes black and beautiful. It releases a strong smell of forest. This liquid is also a food; this is why it makes the plants we eat grow.³³

The anthropomorphism of nature is a common feature in indigenous cosmovision. For Ailton Krenak, to recognize the earth as a being is to contemplate the sense of communion that takes place between man and the space he inhabits.³⁴ The change in cultural perspective with the depersonalization of nature has severe implications for these peoples.

When we depersonalize the river, the mountain, when we strip them of their meaning — an attribute we hold to be the preserve of the human being — we relegate these places to the level of mere resources for industry and extractivism. The result of our divorce from our integrations and interactions with Mother Earth is that she has left us orphans — not just those termed, to a greater or lesser degree, Indigenous peoples, Natives, Amerindians, but everyone.³⁵

The cultural dimension of the involvement between indigenous peoples and their lands was also observed by different international organizations. The Human Rights Committee recognized that, for indigenous peoples, land, natural resources and culture are intrinsically interwoven values. In his General Comment on Article 27 of the International Covenant on Civil and Political Rights, the Committee states that the lands where indigenous peoples develop their cultural practices are contemplated in the provision.³⁶ The Human Rights Council, through its Specialized Mechanism on the Rights of Indigenous Peoples, also stipulated that:

Indigenous peoples' cultural heritage includes tangible and intangible manifestations of their ways of life, world views, achievements and creativity, and should be considered an expression of their self-determination and their spiritual and physical

³¹ WIESSNER, Siegfried. The cultural rights of indigenous peoples: achievements and continuing challenges. *The European Journal of International Law*, v. 22, n. 1, p. 121-140, fev. 2011. p. 129.

³² On the reinterpretation of categories such as indigenous property and use of ancestral land, from a fundamental rights perspective to cultural identity, see: FAUNDES, Juan Jorge; LE BONNIEC, Fabien. Comparando la cultura jurídica desde el derecho a la identidad cultural en Brasil y Chile. *Revista de Direito Internacional*, Brasília, v. 17, n. 1, p. 145-179, 2020.

³³ KOPENAWA, Davi; ALBERT, Bruce. *The Falling Sky: Words of a Yanomami Shaman*. Cambridge/London: The Belknap Press of Harvard University Press, 2013. p. 384.

³⁴ KRENAK, Ailton. *Ideas to postpone the end of the world*. Toronto: House of Anansi Press, 2020.

³⁵ KRENAK, Ailton. *Ideas to postpone the end of the world*. Toronto: House of Anansi Press, 2020.

³⁶ UNITED NATIONS. *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*. General Comment 23, Article 27, Human Rights Committee (Fiftieth session), HRI/GEN/1/Rev.1, 1994. par. 7.

relationships with their lands, territories and resources. While the notion of heritage encompasses traditional practices in a broad sense, including language, art, music, dance, song, stories, sports and traditional games, sacred sites, and ancestral human remains, for indigenous peoples the preservation of heritage is deeply embedded and linked to the protection of traditional territories.³⁷

In her 2017 report, the Special Rapporteur on the Rights of Indigenous Peoples draws attention to the damage caused to the cultural integrity of indigenous peoples forced to leave their native lands, which in turn aggravates the already systematic vulnerabilities of their rights.³⁸

Among the diverse indigenous peoples of the world, a set of articulations between the indigenous with the land coincides: the land is the house, the home; it is the source of material existence; it is the space for spiritual and sacred manifestations; it is the place where development is promoted in its own way. The complexity that emerges from all these predicates implies the need to recognize indigenous peoples' right to cultural integrity.³⁹ It is also in this sense that Gilbert recognizes the interconnection between indigenous cultural heritage and a variability of rights related to it, such as the right to land and natural resources, the right to religion, food and development.⁴⁰

The importance of land as a fundamental factor in the cultural expression of indigenous peoples was also recognized by the Inter-American Court of Human Ri-

ghts⁴¹, which, in the case of the Awas Tingni Community against Nicaragua, declared:

[...] the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.⁴²

The Inter-American Commission on Human Rights also reaffirmed this relationship in its manifestation in the case of the Yakye Axa Indigenous Community against Paraguay.

[...] the State has not guaranteed the property right of the Yakye Axa Indigenous Community of the Enxet-Lengua People and its members to their ancestral territory, depriving them not only of material possession of their territory but also of the basic foundation for the development of their culture, their spiritual life, their wholeness and their economic survival.⁴³

The three main international legal instruments on the rights of indigenous peoples cited here, ILO Convention 169 and the UN and American Declarations on the Rights of Indigenous Peoples, contain provisions on land and its importance for the cultural and spiritual expression of these peoples.⁴⁴ Intellectual property over indigenous cultural heritage – material and immaterial – is also protected in provisions contained in both De-

³⁷ UNITED NATIONS. *Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage*. Human Rights Council (Thirtieth session), Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/30/53, 2015. p. 4.

³⁸ UNITED NATIONS (UN). *Report of the Special Rapporteur on the rights of indigenous peoples*. Human Rights Council (Thirty-sixth session), A/HRC/36/46, 2017, p. 10, par. 50.

³⁹ “[...] the duty to consult arises from the obligations assumed by States under the American Convention on Human Rights, as affirmed by the Inter-American Court of Human Rights. This duty is a corollary of a myriad of universally accepted human rights, including the right to cultural integrity, the right to equality and the right to property [...]”. UNITED NATIONS. *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right of Development*. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. Human Rights Council (Twelfth session), A/HRC/12/34, 2009. p. 14.

⁴⁰ GILBERT, Jérémie. Indigenous Peoples, Human Rights, and Cultural Heritage: Towards a Right to Cultural Integrity. In: XANTHAKI, Alexandra; VALKONEN, Sanna. *Indigenous Peoples' Cultural Heritage: rights, debates and challenges*. Leiden/Boston: Brill Nijhoff, 2017. p. 20-38. p. 24.

⁴¹ Although the Inter-American Human Rights System outperforms in terms of quantity and quality the work of its counterparts from other regions of the planet in the elaboration of a jurisprudence on the rights of indigenous peoples, there is a theme that, according to authors, it seems to claudicate: the preservation of natural resources contained in their lands for indigenous peoples. The Inter-American Court has recognized residual rights of access and exploitation of these resources to the States, sticking, for some, to a purely rhetorical defense of the rights of indigenous peoples. FRANCO, Fernanda Cristina de Oliveira. Oportunidades e desafios das TWAIL no contexto latino-americano a partir de perspectivas dos povos indígenas ao direito internacional. *Revista de Direitos Internacionais*, Brasília, v. 12, n. 2, p. 227-244, 2015.

⁴² INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001. p. 76, par. 149.

⁴³ INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005. p. 70.

⁴⁴ INTERNATIONAL LABOUR ORGANIZATION. *Indigenous and Tribal Peoples Convention* (No. 169), 1989. article 13; UNITED NATIONS. *United Nations Declaration on the Right of Indigenous Peoples*, 2007. article 25; ORGANIZATION OF AMERICAN STATES. *American Declaration on the Rights of Indigenous Peoples*, 2016.

clarations.⁴⁵ In addition to cultural, artistic and spiritual manifestations, an important part of the indigenous cultural heritage is founded on the relationship of the indigenous with the land, such as traditional knowledge associated with genetic resources, the properties of fauna and flora and biodiversity in general and indigenous technologies that stem from that knowledge.

Also included in Convention 169 and UNDRIP are precepts that seek to prevent the forced withdrawal of indigenous people from their lands, guaranteeing, if uprooting is inevitable, the return to their traditional lands when the reasons for transfer cease to exist, or, if the return is impossible, replacing of lands by others of equal quality and legal status.⁴⁶ These provisions aim, for example, to guarantee the rights of indigenous peoples whose lands are affected by infrastructure projects, often implemented by state entities in partnership with the private sector.

However, there are no specific norms in any of the international legal instruments in question that protects indigenous people in a situation of refuge or forced migration. The migrant condition is dealt with only in precepts that provide for indigenous peoples divided by borders.⁴⁷ According to these norms, peoples that are separated have the right to demand from the governments of neighbouring States measures that facilitate the transit and the development of contacts, relationships and direct cooperation for carrying out activities of a cultural, spiritual, social, political and economic nature.⁴⁸

With regard to international legal instruments on refuge, even though the protection of minorities in

humanitarian crises is at the heart of the 1951 Geneva Convention, which also resonates in the 1967 New York Protocol and the 1984 Cartagena Declaration, the provisions of these legal instruments are frequently generic and respond to the concerns and problems that prevailed at the historical moment of their creation.⁴⁹ Thus, there is no mention in any of these legal instruments to the specific situation of indigenous refugees. An explanation for this lack of appropriate mechanisms is the invisibilization of the indigenous in the international system.⁵⁰ The vulnerabilities of indigenous peoples only became part of the international agenda more broadly in the second half of the twentieth century, especially after 1968, when the UN Economic and Social Council revised the accreditation rules for non-governmental organizations, which allowed some indigenous organizations to reach the status of consultative entity, guaranteeing their participation in different debates held at the Organization.⁵¹ Likewise, the incorpo-

⁴⁹ Regarding the issue of access to land, for example, the Geneva Convention on the Status of Refugees deals, in Article 13, with the possibility of acquiring property rights, mobile or immovable, by a refugee. Article 21 provides for accommodation and determines that the State must offer treatment as favourable as possible and at least equal to that given to other foreigners. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES. *Convention and Protocol Relating to the Status of Refugees*, 2010. Available at: <https://www.unhcr.org/3b66c2aa10> Access in: 23 jul. 2020.

⁵⁰ As Burger tells us, in 1923, the traditional leader of the Iroquois people of Canada, Chief Deskaheh, went to Geneva to present demands to the League of Nations. In the following year, a representative of the Maori people also filed a complaint with the entity about indigenous lands confiscated by the British in New Zealand. In both cases, the League of Nations rejected the requests. BURGER, Julian. From outsiders to centre stage: Three decades of indigenous peoples' presence at the United Nations. In: LENNOX, Corinne; SHORT, Damien (eds.). *Handbook of Indigenous Peoples' Rights*. London/New York: Routledge, 2016. p. 315-330. The notable exception was the International Labour Organization (ILO), which was the first to agree on the rights of indigenous peoples, based on investigations into the situation of "native workers" in European colonies, in the 1920s. This initiative resulted in Convention No. 29, from 1930, on forced labour. Between 1952 and 1972, the ILO created and participated with the governments of Bolivia, Ecuador and Peru in the *Andean Indian Programme*. Taking advantage of its experience in this Program, the ILO created the Convention on Tribal and Indigenous Populations, No. 107, in 1957. The criticisms later directed at this Convention, for its integrationist and paternalistic discourse, gave rise to discussions that led to negotiations and approval within the ILO of a new convention on indigenous and tribal peoples, in 1989, Number 169. SWEPSTON, Lee. Indigenous peoples in international law and organizations. In: CASTELLINO, Joshua; WALSH, Niamh (eds.). *International Law and Indigenous Peoples*. Leiden/Boston: Martinus Nijhoff Publishers, 2005. p. 53-66.

⁵¹ MALEZER, Lee. Permanent forum on indigenous issues: 'welcome to the family of the UN'. In: CASTELLINO, Joshua; WALSH,

⁴⁵ UNITED NATIONS. *United Nations Declaration on the Right of Indigenous Peoples*, 2007. article 31; ORGANIZATION OF AMERICAN STATES. *American Declaration on the Rights of Indigenous Peoples*, 2016, article XXVIII.

⁴⁶ INTERNATIONAL LABOUR ORGANIZATION. *Indigenous and Tribal Peoples Convention* (No. 169), 1989. article 16; UNITED NATIONS. *United Nations Declaration on the Right of Indigenous Peoples*, 2007. article 10.

⁴⁷ It is, as Bringas explains, what is known as transnational indigenous migration, already presented in item 2 of the present article. BRINGAS, Asier Martínez de. The impact of migration processes on indigenous peoples' rights. In: CORRADI, Giselle et al. *Critical Indigenous Rights Studies*. London/New York: Routledge, 2019. p. 65-83. p. 70.

⁴⁸ INTERNATIONAL LABOUR ORGANIZATION. *Indigenous and Tribal Peoples Convention* (No. 169), 1989. article 32; UNITED NATIONS. *United Nations Declaration on the Right of Indigenous Peoples*, 2007. article 36; ORGANIZATION OF AMERICAN STATES. *American Declaration on the Rights of Indigenous Peoples*, 2016.

ration of specific issues of indigenous peoples into the agenda of the United Nations High Commissioner for Refugees (UNHCR) was slow to take effect. Today the organization is developing studies that understand the special condition of indigenous peoples in a situation of refuge.⁵²

On the other hand, with regard to the special importance of land for indigenous peoples, the eventual possibility of resettling indigenous refugees in a certain part of the territory of the host State has little dependence on international agencies. The resettlement of indigenous refugees in a territory where they can live according to their traditions and customs represents one of the possible solutions for refuge.⁵³ However, its realization depends on a sovereign manifestation and is subject to political, social, economic and even ideological forces, often not very receptive to the idea of settling indigenous groups from foreign countries in donated territories, even though they are in a situation of high vulnerability.

The land provides not only the existential resources to indigenous peoples, but also a source of spiritual nourishment, an aspect that gives them cohesion. Thus, the removal of the indigenous from the traditional territory by emigration has significant effects, since it triggers a process of cultural adaptation⁵⁴, both by the loss of access to the natural resources necessary for the material realization of their culture – often not available in the place of destination –, as well as the abandonment of symbolic sites and sacred places, important driving forces in the spiritual renewal and cultural dynamics of a people.

Indigenous emigration from the traditional land or from rural territories to urban centres in itself is not a recent phenomenon and occurs on a global scale. Indigenous peoples are forced to emigrate in general due to violations of their basic rights and to the action or inaction of political and social actors.⁵⁵ There are several reasons for indigenous emigration: widespread human rights violations; expulsion from their lands by the invasion of third parties for the exploitation of natural resources, often authorized by the state government; suspension or interruption of processes of recognition and demarcation of indigenous lands, which enhances situations of confrontation with invaders; armed conflicts; extreme poverty; natural disasters; climate change etc.⁵⁶

In search of protection, indigenous groups in a situation of refuge are almost always obliged to migrate to urban centres. In general, the indigenous urbanization process is marked by a disproportionate poverty in relation to other city residents.⁵⁷ They are pushed to the peripheries, living in hovels, and are frequently subjected to practices of marginalization and discrimination, as an effect of the inheritance of social and racial relations and hierarchies of the colonial period.⁵⁸ In urban contexts, the indigenous identity tends to be undervalued, as well as the specific rights associated with it. Rights such as self-determination and self-governance, fundamental to the preservation and development of their own cultural practices, are more commonly associated with indigenous groups living on traditional lands and rarely recognized by indigenous people living in urban settings.

Indigenous groups that migrate to another country in search of refuge usually fall into three situations that place them in deep vulnerability. Most often they find themselves: (1) placed in shelters, maintained by government entities, international or civil society organizations; (2) seeking accommodation in empty or abandoned buildings or joining others in spontaneous camps (in

Niamh (eds.). *International Law and Indigenous Peoples*. Leiden/Boston: Martinus Nijhoff Publishers, 2005. p. 67-86. p. 76.

⁵² UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES. *Minorities and Indigenous Peoples*. Available at: <https://www.unhcr.org/minorities-and-indigenous-peoples.html> Access in: 23 jul. 2020.

⁵³ Although a significant part of indigenous peoples lives on traditional lands, there are those who are already inserted in urban contexts. The latter should not be undervalued in relation to the former. This reality is also reflected in migratory processes in search of refuge. Thus, part of the indigenous people in a situation of refuge seeks to resume their life projects in the cities of the host country. TUPUOLA, Anne-Marie. *Urban Indigenous Peoples and Migration*. 2010. Available at: https://mirror.unhabitat.org/downloads/docs/AM_TupuolaWUF_Presentation.pdf Access in: 23 jul. 2020.

⁵⁴ INTERNATIONAL ORGANIZATION FOR MIGRATION. *Indigenous routes: a framework for understanding indigenous migration*. Available at: https://publications.iom.int/system/files/pdf/indigenous_routes.pdf Access in: 23 jul. 2020.

⁵⁵ As we saw in Bringas, in section 2 of this article. BRINGAS, Asier Martínez de. The impact of migration processes on indigenous peoples' rights. In: CORRADI, Giselle et al. *Critical Indigenous Rights Studies*. London/New York: Routledge, 2019. p. 65-83. p. 71.

⁵⁶ UNHABITAT. *Securing Land Rights for Indigenous Peoples in Cities*. Available at: <https://gltn.net/download/securing-land-rights-for-indigenous-people-in-cities/?wpdmdl=8333&refresh=5f26b88fa8eae1596373135> Access in: 23 jul. 2020.

⁵⁷ HORN, Philipp. *Indigenous rights to the city: ethnicity and urban planning in Bolivia and Ecuador*. London: Routledge, 2019. p. 2.

⁵⁸ QUIJANO, Aníbal. Coloniality of Power and Eurocentrism in Latin America. *International Sociology*, v. 15, n. 2, p. 215-232, jun. 2000.

general, considered irregular according to city planning laws), or (3) living precariously on the city streets. In any case, the obstacles to claiming specific rights that concern them as indigenous people are not only heightened by being in an urban context. The precariousness and poverty that characterize indigenous groups seeking refuge provides a high degree of dependence by these groups on the decisions and actions of international, government and civil society agencies. Despite efforts to provide an environment that seeks participatory solutions, opening channels for indigenous refugees to express their desires and demands, as noted by McNeish and Eversole, these entities constitute their objectives from a perspective of precariousness and poverty as problems whose solution involves social and economic development and not as an issue of politics and access to specific rights.⁵⁹ Thus, objectives such as social inclusion and economic development may move away from others such as self-determination, self-government and preservation of cultural specificities.⁶⁰

5 Indigenous refugees and the erosion of linguistic heritage

Although there are currently between 7.000 and 7.500 languages known in the world – 75% of them indigenous –, it is estimated that, every two weeks, one of them disappears⁶¹ and a system of knowledge and

a cosmovision vanishes with it.⁶² This gradual decline in linguistic diversity occurs due to the accumulation of several reasons: the death of the last members of a group to know the language, in general the elderly; absence of public policies on multilingualism; discrimination against the use of indigenous languages; migratory processes that make it difficult to sustain intergenerational transmission,⁶³ among others.

The language of a people has the vital role of being the vehicle of its intangible cultural heritage.⁶⁴ Thus, protecting indigenous languages is a way of preserving the means through which different cultural expressions of these groups are organized and manifested, given that it is through language that the symbolic order that gives meaning to the material and immaterial world is constituted. However, languages themselves are also immaterial cultural expressions that identify indigenous peoples, being, at the same time, component of intangible cultural heritage and means for its dissemination. Languages are protected in this dual role by the Convention for the Safeguarding of Intangible Cultural Heritage, approved in 2003 at the General Conference of the United Nations Educational Organization, Science and Culture (UNESCO). However, in the migratory context that marks the indigenous groups in refuge situation, this protection tends to be more tenuous and problematic, for several reasons, as will be seen below.

The most comprehensive initiative to legally protect intangible cultural heritage took almost 60 years to materialize, since the founding of UNESCO in 1946. Legal acts such as the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), the Venice Charter for the Conservation and Restoration of Monuments and Sites (1964), and even the Convention concerning the Protection of the World Cultural and Natural Heritage (1972) emphasize mate-

⁵⁹ MCNEISH, John-Andrew; EVERSOLE, Robyn. Conclusions: poverty, peoples and the meaning of change. In: EVERSOLE, Robyn; MCNEISH, John-Andrew; CIMADAMORE, Alberto D. (ed). *Indigenous peoples and poverty: an international perspective*. London: Zed Books, 2005. p. 290-294. p. 290.

⁶⁰ Long-term compliance with rules inherent to the management of shelters for migrants and refugees in host countries can lead to a strained enforcement. In the case of indigenous refugees, non-compliance or imperfect compliance with certain rules may represent the ultimate instance of self-government and self-determination, in circumstances deeply marked by dependence on the actors responsible for migratory management. Aguiar and Magalhães, for example, observed that, in Roraima, in northern Brazil, indigenous refugees of the Warao ethnicity, coming from Venezuela, preferred to hang their hammocks and sleep outside the shelters that were intended for them than complying with an adopted curfew rule. AGUIAR, Carolina Moulin; MAGALHÃES, Bruno. Operation shelter as humanitarian infrastructure: material and normative renderings of Venezuelan migration in Brazil. *Citizenship Studies*, v. 24, n. 5, p. 642-662, jul. 2020.

⁶¹ CORONEL-MOLINA, Serafin M. Media and technology: revitalizing Latin American indigenous languages in cyberspace. In: MCCARTY, Teresa L. *et al.* *A world of indigenous languages: politics,*

pedagogies and prospects for language reclamation. Bristol: Multilingual Matters, 2019. p. 91-114. p. 91.

⁶² ODELO, Marco. The United Nations Declaration on the right of indigenous peoples. In: LENNOX, Corinne; SHORT, Damien. *Handbook of Indigenous Peoples Rights*. London/New York: Routledge, 2016. p. 51-68. p. 56.

⁶³ LAGUNAS, Rosalva Mojica. Language key holders for mexicano: the case of an intergenerational community in Coatepec de los Costales Mexico. In: MCCARTY, Teresa L.; NICHOLAS, Sheilah; WIGGLESWORTH, Gillian. *A world of indigenous languages: politics, pedagogies and prospects for language reclamation*. Bristol: Multilingual Matters, 2019. p. 214-234. p. 216.

⁶⁴ UNESCO. *Convention for the Safeguarding of the Intangible Cultural Heritage*, 2003, article 2.

rial goods and cultural properties. The emergence, in the second half of the 20th century, of a cultural approach to anthropological thought, in addition to the change of focus in Social Sciences, which started to emphasize the process instead of the object, contributed to the redefinition of the concept of heritage and gave rise to an opportunity, within UNESCO, to new normative and institutional arrangements that paved the way for the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage.⁶⁵

Even so, as Marrie notes, despite the fact that most cultural diversity originates from indigenous cultures, the 2003 UNESCO Convention uses the term “indigenous” only once in its preamble⁶⁶, possibly because there was no participation in the treaty negotiation process of international bodies’ representatives specialized on indigenous matters – such as the United Nations Permanent Forum on Indigenous Issues – and the absence of indigenous representatives in the negotiating countries’ delegations.⁶⁷ In any case, this is yet another sign of the persistent invisibility of indigenous peoples’ desires before national governments and the international community.

As part of their intangible heritage, indigenous languages represent a field in which the people and their ancestors’ cultural expressions are found and whose continuity over time involves the negotiation of elements of the present and the anticipation of the future.⁶⁸ For this reason, the imposition of a new contextual

dimension on language by the diaspora of an indigenous people does not affect at first the nature of their identity in relation to that people. The language will be the bridge between the past and the different present contexts of a people in diaspora, regardless of whether or not it is permeated by national borders.

This is an aspect of immaterial culture that is supported by the 2003 UNESCO Convention. Although the Convention does not have a specific provision on migrants or refugees, the language and other immaterial cultural expressions of diasporic groups can be placed on the Representative List of Cultural Heritage of the Humanity (created under the provisions of Article 16 of the Convention), for it recognizes that cultural boundaries do not always coincide with national ones.⁶⁹

Indigenous languages and other cultural expressions are also covered by the rules of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted in 2005 at the UNESCO General Conference. The Convention recognizes the importance and need to protect and promote typical indigenous traditional knowledge and cultural expressions as a means of realizing the principle of equal dignity and respect for all cultures, one of the foundations of the philosophy of cultural diversity.⁷⁰ In addition, the Convention urges States parties to adopt appropriate safeguard measures for the protection and preservation of cultural expressions that are in danger of extinction in their territory, which includes indigenous languages that are at risk of disappearing.⁷¹

In this sense, the UN, through General Assembly Resolution 71/178, declared itself “[d]eeply concerned at the vast number of endangered languages, in particular indigenous languages”,⁷² which is why it proclaimed the year 2019 as the International Year of Indigenous Languages.⁷³

⁶⁵ The creation of a Committee of Experts on the Safeguarding of Folklore (1982), the formulation of a Recommendation on the Safeguarding of Traditional Culture and Folklore (1992) and the launch of programs such as the Living Human Treasures System (1993) and the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity (1998) contributed to this process. BOUCHENAKI, Mounir. A major advance towards a holistic approach to heritage conservation: the 2003 Intangible Heritage Convention. *International Journal of Intangible Heritage*, Seoul, v. 2, p. 106-107, 2007.

⁶⁶ “Recognizing that communities, in particular *indigenous* communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity”. UNESCO. *Convention for the Safeguarding of the Intangible Cultural Heritage*, 2003.

⁶⁷ MARRIE, Henrietta. The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage and the protection and maintenance of the intangible cultural heritage of indigenous peoples. In: SMITH, Laurajane; AKAGAWA, Natsuko. *Intangible Heritage*. London/New York: Routledge, 2009. p. 169-192. p. 174.

⁶⁸ KEARNEY, Amanda; KOWALEWSKI, Gabrielle. Refuting timelessness: emerging relationships to intangible cultural heritage for younger Indigenous Australians. In: STEFANO, Michelle L.; DAVIS, Peter (ed.). *The Routledge Companion to Intangible Cultural Herit-*

age. London/New York: Routledge, 2017. p. 285-299. p. 288.

⁶⁹ BLAKE, Janet. *International Cultural Heritage Law*. Oxford: Oxford University Press, 2015. p. 283.

⁷⁰ KONO, Toshiyuki. Guiding Principles. In: VON SCHORLEMER, Sabine; STOLL, Petter-Tobias. *The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*. Heidelberg: Springer, 2012. p. 83-114. p. 105.

⁷¹ UNESCO. *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 2005.

⁷² UNITED NATIONS. *Resolution adopted by the General Assembly on 19 December 2016, 71/178, Rights of Indigenous Peoples*. Available at: <https://undocs.org/en/A/RES/71/178> Access in: 23 jul. 2020.

⁷³ In addition to the proclamation of the year 2019 as the International Year of Indigenous Languages, other international campaigns

The migratory issue has also been raised with regard to the rights and duties of protecting mother tongues of diasporic groups. In discussions on multilingualism at UNESCO, questions were raised about how to protect and promote rights of migrant groups over their languages, a problem that is difficult to solve since it implies the possibility of interventions by one State in the internal affairs of another.⁷⁴

The three main legal instruments of indigenous peoples' law – ILO Convention 169, UNDRIP and ADRIP – have provisions aimed at promoting and protecting indigenous languages. Special attention is paid to the right of indigenous children to be taught in the language of the people to which they belong.⁷⁵ The States have to counterpart by adopting measures that provide a pluricultural and plurilingual education, guaranteeing future generations of indigenous peoples access to their languages, writing systems and oral traditions.⁷⁶ Also included in these instruments is the right of indigenous peoples to constitute their own means of information and communication, expressed in their native language.

were launched to protect linguistic cultural expressions, such as: (1) the definition of 21 February as the International Day of Mother Languages, celebrated since the year 2000; (2) the proclamation by UNESCO General Assembly of 2008 as the International Year of Languages; (3) the launch of UNESCO World Atlas of Languages in Danger. OLIVEIRA, Gilvan Müller. Dossier Línguas Indígenas, 2019, o ano internacional das línguas indígenas: uma campanha político-linguística internacional. *Revista Digital de Políticas Linguísticas*, v. 11, p. 105-113, nov. 2019. p. 107. The United Nations General Assembly, through Resolution A/74/396, proclaimed 2022-2032 as the International Decade of Indigenous Languages. UNITED NATIONS. *Resolution adopted by the General Assembly on 2 December 2019, A/74/396, Rights of Indigenous Peoples*. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/389/49/PDF/N1938949.pdf?OpenElement>. Access in: 23 jul. 2020.

⁷⁴ Blake refers to the debates that took place at the 'Workshop on Standard-setting Instruments Promoting Multilingualism', organized by UNESCO on the International Mother Language Day, 21 February 2008, in Paris. BLAKE, Janet. Standard-Setting instruments promoting multilingualism: launch of the United Nations international year of mother languages - UNESCO, Paris, February 21, 2008. *International Journal of Cultural Property*, v. 15, n. 4, p. 433-436, nov. 2008; BLAKE, Janet. *International Cultural Heritage Law*. Oxford: Oxford University Press, 2015. p. 282.

⁷⁵ This concern was also expressed, with specificity for indigenous and other minority children, in Article 30 of the Convention on the Rights of the Child. UNITED NATIONS. *Convention on the Right of the Child*, 1989.

⁷⁶ INTERNATIONAL LABOUR ORGANIZATION. *Indigenous and Tribal Peoples Convention* (No. 169), 1989. article 28; UNITED NATIONS. *United Nations Declaration on the Right of Indigenous Peoples*, 2007. articles 13 e 14; ORGANIZATION OF AMERICAN STATES. *American Declaration on the Rights of Indigenous Peoples*, 2016.

ges.⁷⁷

The Inter-American Court of Human Rights also emphasized the importance of indigenous languages as a factor of cultural differentiation when expressing in its considerations regarding the *López Álvarez v. Honduras Case* that "[l]anguage [is] one of the most important elements of identity of any people, precisely because it guarantees the expression, diffusion, and transmission of their culture".⁷⁸

As regards the 1951 Convention on the Status of Refugees, there is no specific provision that protects linguistic cultural expressions. Some provisions of the Convention may offer laterally the bases upon which the public policies of the States with regard to refugees can be constituted, as well as the effects that may be caused in the original languages of those who are in a condition of refuge. Article 3 of the Convention provides for the obligation of States not to discriminate. Specifically, it refers to discrimination by race, religion, and country of origin. A broad interpretation of the prohibition of discriminating against the refugee's origin makes it possible to cover aspects related to the country from which he came, including the languages spoken there. On the other hand, Article 22 of the 1951 Convention refers to public education in the host country, which should give the same treatment to refugee children as to national children in primary education and as favourable as possible (and no less favourable than to other foreigners) in the youth and adult education process. Finally, Article 34, which deals with naturalization, states that the State will facilitate the *assimilation* of refugees.

In turn, the Cartagena Declaration, in its sixth and eleventh conclusions, emphasizes the importance of implementing projects to integrate refugees into the host society, including the facilitation of their insertion into the labour market. It does not indicate – as the Geneva Convention does on the assimilation model – how these integration policies could be developed.

Although the public policies on integration adopted by States with regard to refugees have refugee law and human rights as their international parameters, the ab-

⁷⁷ UNITED NATIONS. *United Nations Declaration on the Right of Indigenous Peoples*, 2007. article 16; ORGANIZATION OF AMERICAN STATES. *American Declaration on the Rights of Indigenous Peoples*, 2016. article XIV.

⁷⁸ INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of López-Álvarez v. Honduras*. Judgment of February 1, 2006. p. 58, par.171.

sence of specific references on linguistic diversity policies leaves States with a wide margin of discretion and may even adopt measures of an assimilationist character.

Indeed, countries that present themselves as pluralist societies have been assuming a public policy strategy that, while recognizing the existence of multilingualism in society, establish a type of linguistic assimilation by demanding that migrants and refugees be proficient in the languages of the host State as a requirement for its naturalization.⁷⁹ This practice is called by Gramling *cosmopolitan multilingualism* or *ius linguarum*.⁸⁰ This goes against the integration process, as described by Li and Sah, which must involve both the acceptance by immigrants and refugees of the laws and values of the host society and the respect of their identities and dignity, which includes recognition and preservation of their native languages by the host State.⁸¹ Thus, besides not implementing a public assimilation policy that presupposes the adoption by the foreigner of the local language, it is essential that, in the welcoming process, a pluralist policy of tolerance to diversity is actively assumed to avoid xenophobia and social exclusion.⁸²

As Matheson states, although today we live in a more or less post-colonial world, colonialism is reluctant and its end is slow.⁸³ The decolonization process undertaken

in the second half of the 20th century resonates with international instruments that recognize the right of minorities to access education according to their culture and in their own language⁸⁴. Equally, there are national efforts to make education less assimilationist, adopting policies that emphasize bilingualism and interculturality.⁸⁵ With regard to indigenous people, there are national experiences of training native teachers, valuing their original languages.⁸⁶

However, indigenous children and young people in refugee situations are hardly included in formal education. Reasons include the usual unpreparedness of the host state's educational system, including the issue of language, to deal with specific overlapping demands: those of refugees⁸⁷ and those of indigenous people, as already seen, guaranteed in international instruments for the rights of indigenous peoples.

The lack of a formal culturally appropriate education system, especially for children, is often supplied by civil society actions, constituting informal bilingual education spaces with the help of members of the indigenous refugee group itself.⁸⁸ These initiatives, however, are punctual, unsystematic and depend on the mobilization of people, resources and knowledge not always available at the place of reception.

In the case of adult members of indigenous families in a situation of refuge, they are not always proficient in the majoritarian language of the country from which they come. Communication, then, becomes more diffi-

⁷⁹ "A survey of current language policies and programs in major receiving countries (such as the U.S., Canada, Australia, the U.K., Norway, Sweden, Spain, Greece, and Portugal) reveals that despite the increasing heterogeneity in newcomers' linguistic, socioeconomic, and educational backgrounds, the policies and programs in all these countries still practice 'cosmopolitan monolingualism'. LI, Guofang; SAH, Kumar. Immigrant and refugee language policies, programs and practices in an era of change: promises, contradictions, and possibilities. In: GOLD, Steven J.; NAWYN, Stephanie J. (eds.). *Routledge International Handbook of Migration Studies*. 2. ed. London/New York: Routledge, 2019. p. 325-338. p. 327.

⁸⁰ Gramling uses the expression *ius linguarum* in reference to *ius sanguinis* and *ius soli* as criteria for recognition of nationality. GRAMLING, David. The new cosmopolitan monolingualism: on linguistic citizenship in twenty-first century Germany. *Teaching German*, v. 42, n. 2, p. 130-140, nov. 2009.

⁸¹ LI, Guofang; SAH, Kumar. Immigrant and refugee language policies, programs and practices in an era of change: promises, contradictions, and possibilities. In: GOLD, Steven J.; NAWYN, Stephanie J. (eds.). *Routledge International Handbook of Migration Studies*. 2. ed. London/New York: Routledge, 2019. p. 325-338. p. 327.

⁸² LI, Guofang; SAH, Kumar. Immigrant and refugee language policies, programs and practices in an era of change: promises, contradictions, and possibilities. In: GOLD, Steven J.; NAWYN, Stephanie J. (eds.). *Routledge International Handbook of Migration Studies*. 2. ed. London/New York: Routledge, 2019. p. 325-338. p. 329.

⁸³ MATHESON, David. Imperial culture and cultural imperialism. *European Journal of Intercultural Studies*, v. 7, n. 1, p. 51-56, 1996.

⁸⁴ Article 5, par. 1, (c) of the UNESCO Convention on combating discrimination in the field of education. UNESCO. *Convention against Discrimination in Education*, 1960.

⁸⁵ TINAJERO, Guadalupe; ENGLANDER, Karen. Bilingual-intercultural education for indigenous children: the case of Mexico in an era of globalization and uprising. *Intercultural Education*, v. 22, n. 3, p. 163-178, jun. 2011.

⁸⁶ BAPTAGLIN, Leila A.; FERREIRA, Paulo F. de L. B. Possibilidades da formação superior indígena a distância no Instituto Insikiran/UFRF: a língua indígena em foco. *Educação em Revista*, v. 20, n. 2, p. 61-76, jul./dez. 2019.

⁸⁷ Essomba notes the lack of an adequate reception structure in European education systems. ESSOMBA, Miquel Àngel. The right to education of children and youngsters from refugee families in Europe. *Intercultural Education*, v. 28, n. 2, p. 206-218, 2017.

⁸⁸ As exemplified by the experience of Casa de los Niños, carried out in the state of Roraima with indigenous people of the Warao ethnic group, coming from Venezuela, who are in a situation of refuge. AMAZÔNIA REAL. *Migrante cidadão: eles escolheram a solidariedade ao invés do preconceito*. Available at: <https://amazoniareal.com.br/migrante-cidadao-eles-escolheram-solidariedade-ao-inves-do-preconceito/> Access in: 23 jul. 2020.

cult and in general depends on mediation by a member of the group who is able to express themselves in a language known to the agents responsible for the asylum application process and integration management. The vulnerability of indigenous refugees is exacerbated by these communication barriers they face. In addition, the host state's indigenous agencies rarely have physical and human resources, or even the political will, to meet the specific demands of indigenous groups from abroad.⁸⁹

6 Conclusions

The condition of the indigenous refugees, as seen, is marked by invisibility in relation to the circumstance of profound vulnerability to which they are subjected and there is no normative provision with the degree of specificity necessary to guarantee for these individuals dignity and adequate protection of their culture. Even the concept of indigenous refugee needs to be built on the basis of definitions provided for in international legal studies and instruments that refer separately to the international refugee and indigenous peoples law. Likewise, the lack of proper international instruments to support the indigenous refugees leaves the only option for their protection to be based on the combination of norms belonging to the legal frameworks regarding the identities coincided in this person.

Given that the duty to protect corresponds to the State, it is important to understand the mandatory level of the right that indigenous people in refugee situations may have access to, since part of the rules that apply to them are found in soft law instruments. As seen, being provisions of declarations instead of international treaties does not necessarily imply a disadvantage. On the one hand, because the adoption of declarations corresponds to a strategy of reaching the widest possible participation of non-state entities in the process of elaboration and negotiation of their rules. On the

other hand, because soft law rules gain greater obligatory density as they are supported by domestic and international law. Furthermore, they can give rise to the formation of international custom – to the extent that they translate into the domestic and international practices adopted by the States, as well as the *opinio juris* of their mandatory nature – or lead to the elaboration of future conventions on the subject.

However, in spite of being able to resort to hard and soft law rules regarding international refugee and indigenous peoples law, the absence of a proper legal treatment for indigenous refugees already represents an expression of the invisibility of their condition in the face of international community.

It is not all, however. The profound vulnerability to which they are subjected, the alienation from consubstantial factors of their cultural expressions – such as the traditional land – and the very situation of foreignness – which can lead to the resistance of indigenous institutions in the host State to assume as its competence to deal with the situation of peoples that they classify as foreigners – represent faces of indigenous peoples' invisibility before the host State, with prejudice to their subjective rights.

All of these circumstances profoundly affect the cultural expressions of indigenous refugees in their different dimensions, as can be seen with regard to the effects caused by the distancing from the traditional land and the weakening of the use of the native language when in a situation of refuge.

Land for the indigenous, as widely recognized, is not only a source of existential means, but also of spiritual resources. Indigenous refugees are generally faced with an urban environment that imposes a series of challenges on the preservation of their culture. Even those already used to the urban environment continue to have to overcome the limitations inherent to their vulnerability and foreignness. It is not uncommon that, in these circumstances, indigenous refugees remain under a condition of dependence on government agencies or civil society solidarity actions, with little to no space to exercise their self-determination, an axial factor in the expression of their dignity, provided as a fundamental right at UNDRIP and ADRIP.

The language is itself a cultural trait and, at the same time, a vehicle for other expressions of culture. Besides, it is the way indigenous peoples organize and translate

⁸⁹ Magalhães observes that, in the case of indigenous people coming from Venezuela, and who find themselves as refugees or asylum seekers in Brazil, the Fundação Nacional do Índio (FUNAI) has acted timidly because it understands that “there is nothing in the legislation that ensures appropriate and specific protection to their work with indigenous Venezuelan”. MAGALHÃES, Bruno. Dançando Ciranda com a Lei: a FUNAI e a recepção de migrantes indígenas. In: BAENINGER, Rosana; SILVA, João Carlos J. S. (coord.). *Migrações Venezuelanas*. Campinas: Núcleo de Estudos de População “Elza Berquó” – Nepo/Unicamp, 2018. p. 126-134.

reality. Although UNESCO's regimes for the protection of intangible heritage and cultural diversity can be applied to indigenous cultural expressions, including their languages, and the efforts of the international community to alert and create the conditions to prevent it, the process of gradual extinction of indigenous languages continues.

Indigenous refugees are generally faced with integration policies that, from a linguistic point of view, are often assimilationist. The deep vulnerability of such condition forces individuals in refuge situation to adapt to the host language. In addition, as the refuge circumstance is protracted, children end up entering a system that does not provide them, as foreseen in international law, an intercultural education that could allow them to preserve their native language and the main elements of their culture.

Finally, the complexity that characterizes the condition of indigenous refugees imposes a series of issues that challenge the coherence of the international community and of liberal and democratic States regarding their commitments to human rights and the foundation of human dignity. Although it is not possible to resolve all issues, tackling them presupposes adopting some measures. First, assuring the visibility of the specificities inherent to the indigenous refugee condition, clearly discerning these particularities in the elaboration of public policies. Second, that indigenous refugees should be included in the process of seeking solutions to problems that are specific to their condition, giving them a voice and guaranteeing them the exercise of their right of self-determination. Third, that, among the lasting measures of refuge to be adopted by the host State, it comprehends the access to land, where indigenous refugee families, with material support from the host State and civil society organizations, can reproduce, as much as possible, their own culture, education, traditions and customs, in a self-governing regime.

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